RECORD AND BRIEFS

FILED
JUN - 9 2017
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No. 141, Original

In the Supreme Court of the United States

STATE OF TEXAS, PLAINTIFF

v.

STATE OF NEW MEXICO
AND
STATE OF COLORADO

ON EXCEPTIONS TO THE FIRST INTERIM REPORT OF THE SPECIAL MASTER

EXCEPTION OF THE UNITED STATES AND BRIEF FOR THE UNITED STATES IN SUPPORT OF EXCEPTION

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EXCEPTION OF THE UNITED STATES

The United States excepts to the Special Master's recommendation that the United States' complaint in intervention should be dismissed to the extent that it asserts claims under the Rio Grande Compact, Act of May 31, 1939, ch. 155, 53 Stat. 785.

Respectfully submitted.

JEFFREY B. WALL
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JUNE 2017

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BRIEF FOR THE UNITED STATES IN SUPPORT OF EXCEPTION

JURISDICTION

The Court granted Texas's motion for leave to file a bill of complaint on January 27, 2014. The Court granted the United States' motion for leave to intervene as a plaintiff on March 31, 2014. On April 30, 2014, New Mexico filed a motion to dismiss Texas's complaint and the United States' complaint in intervention. On November 3, 2014, the Court appointed A. Gregory Grimsal to serve as Special Master. On February 13, 2017, Special Master Grimsal submitted a first interim report that addresses New Mexico's motion to dismiss and motions to intervene filed by two irrigation districts. On March 20, 2017, the Court received the Special Master's report, ordered it filed, and allowed the parties to file exceptions. The jurisdiction of this Court rests on Article III, Section 2,

Clause 2 of the Constitution and 28 U.S.C. 1251(a) and (b)(2).

STATEMENT

A. Introduction

The Rio Grande Compact (Compact), Act of May 31, 1939, ch. 155, 53 Stat. 785, apportions the waters of the Rio Grande Basin among the States of Colorado, New Mexico, and Texas. See First Interim Report of the Special Master (Rep.) App. A1-A19. Under the Compact, Colorado is required to deliver a specified quantity of water to the New Mexico state line. New Mexico is then required to deliver a specified quantity of water to Elephant Butte Reservoir on the Rio Grande in New Mexico approximately 105 miles north of the Texas state line. Elephant Butte Reservoir is part of the Rio Grande Project (Project), a federal Bureau of Reclamation (Reclamation) project that was authorized, constructed, and already delivering water pursuant to contracts with irrigation districts in southern New Mexico and western Texas before the States entered into the Compact.

In 2013, Texas sought leave to file a bill of complaint against New Mexico to enforce its rights under the Compact. Texas complains that New Mexico has depleted Texas's equitable apportionment under the Compact by allowing diversion of surface water and pumping of groundwater that is hydrologically connected to the Rio Grande downstream of Elephant Butte Reservoir, thereby diminishing the amount of water that flows into Texas. At the Court's invitation, the United States filed a brief as amicus curiae, recommending that the Court grant Texas leave to file its bill of complaint. On January 27, 2014, the Court granted Texas leave to file and invited New Mexico to

file a motion to dismiss, in the nature of a motion under Federal Rule of Civil Procedure 12(b)(6).

The United States filed a motion for leave to intervene as a plaintiff and a proposed complaint in intervention based on several distinct federal interests that are at stake in this dispute over the interpretation of the Compact. On March 31, 2014, the Court granted the United States' motion for leave to intervene as a plaintiff. The United States agrees that New Mexico is not fulfilling its Compact obligations to Texas. The United States further alleges that New Mexico has violated provisions of the Compact that protect the United States' interests, including its interest in the Project and its interest in compliance with a treaty obligation of the United States to deliver water to Mexico. After the case was referred to the Special Master (Master), two irrigation districts that have contracts with Reclamation for delivery of project water also filed motions for leave to intervene.

New Mexico moved to dismiss the complaints filed by Texas and the United States. New Mexico contends that the complaints fail to state a claim upon which relief can be granted because no Compact provision prohibits New Mexico from interfering with Project deliveries to Texas after New Mexico delivers water to Elephant Butte Reservoir. New Mexico contends that the Project's operations downstream of Elephant Butte Reservoir instead are controlled by state law, and that any remedy for interference with Project deliveries on the part of New Mexico water users therefore must be left to a state-law suit brought by the United States against any offending water users.

The Master has recommended that the Court deny New Mexico's motion to dismiss the complaint filed by Texas. As for the United States' complaint in intervention, the Master has recommended that the Court grant New Mexico's motion to dismiss to the extent the United States asserts claims under the Compact, but deny the motion to the extent the United States asserts claims under federal reclamation law. The Master further recommends that the Court deny the motions for leave to intervene filed by the irrigation districts.

In this exception, the United States urges the Court to reject the Master's recommendation that the United States' complaint in intervention be dismissed to the extent the United States asserts a claim under the Compact.

B. The Rio Grande Basin

The Rio Grande River rises in Colorado, flows south into New Mexico, then flows into Texas near El Paso. Rep. App. B1 (map). After crossing the New Mexico-Texas state line, the Rio Grande forms the international boundary between the United States and Mexico until it flows into the Gulf of Mexico near Brownsville, Texas. See *ibid.*

The Compact defines the Rio Grande Basin as "all of the territory drained by the Rio Grande and its tributaries in Colorado, in New Mexico, and in Texas above Fort Quitman." Art. I(c), 53 Stat. 785. Fort Quitman is located about 80 miles southeast of El Paso. Rep. App. B1. The Basin is approximately 700 miles long and has a drainage area of approximately 34,000 square miles. Nat'l Resources Comm., *Regional Planning, Part VI—The Rio Grande Joint Investigation in the Upper Rio Grande Basin in Colorado,*

New Mexico, and Texas, 1936-1937, at 7, 296, 299 (1938) (*Joint Investigation*).

C. The Rio Grande Project

1. In the 1890s, recurring water shortages along the lower Rio Grande prompted the Mexican government to press claims against the United States, alleging that shortages were due to increased diversions in Colorado and New Mexico. *Joint Investigation* 8, 73. In 1896, in response, the U.S. Department of the Interior (Interior) imposed an embargo on any new use of federal land for works to divert water from the Rio Grande in Colorado and the Territory of New Mexico. *Id.* at 8; see *Waters of the Rio Grande and Its Tributaries*, H.R. Doc. No. 39, 62d Cong., 1st Sess. 2 (1911). In addition, at the direction of the International Boundary Commission, an investigation was made into "[t]he best and most feasible mode of * * * regulating the use of the waters of [the] river" so as to "secure to each country * * * [its] legal and equitable rights and interests." U.S. Geological Survey, *Third Annual Report of the Reclamation Service 1903-4*, H.R. Doc. No. 28, 58th Cong., 3d Sess. 396 (2d ed. 1905) (*Third Annual Report*). That investigation concluded that a large storage reservoir should be built on the Rio Grande above El Paso. *Id.* at 396-397.

In 1903, following enactment of the federal Reclamation Act (1902 Act), ch. 1093, 32 Stat. 388, Interior commissioned a new investigation on the Rio Grande, to be conducted by the Reclamation Service (Reclamation's predecessor). See U.S. Geological Survey, *Second Annual Report of the Reclamation Service 1902-3*, H.R. Doc. No. 44, 58th Cong., 2d Sess. 375 (1904). Reclamation concluded that a dam at Elephant Butte, near Engle, New Mexico, would be preferable to the

dam closer to El Paso recommended by the International Boundary Commission. See *Third Annual Report* 418-420. Because of its geographical setting and upstream location, the Elephant Butte dam would be able to impound more water and irrigate more land than a dam near El Paso, including as many as 90,000 acres in New Mexico. See *id.* at 410-419 & Plate XLVII (description and map of project). Thus, unlike the El Paso dam recommended by the International Boundary Commission, a dam at Elephant Butte would not "leave New Mexico out" from the benefit of the project. *Id.* at 397.

In 1904, at an Irrigation Congress attended by representatives of the New Mexico Territory, the State of Texas, other western States, and the Republic of Mexico, Reclamation presented its recommendation for the Elephant Butte dam. See *Official Proceedings of the Twelfth National Irrigation Congress* 213-215 (Guy E. Mitchell ed., 1905) (*Official Proceedings*). Representatives from Texas and New Mexico, as well as a delegation from Mexico, "heartily endorse[d] and approve[d]" the reservoir at Elephant Butte "as a happy solution of a vexed question that has embarrassed the parties interested." *Id.* at 107.

2. As a Reclamation Act project, the construction of the dam at Elephant Butte could be financed by charging assessments on irrigable land on a per-acre basis. See § 4, 32 Stat. 389. The Reclamation Act, however, did not authorize irrigation projects in Texas. See § 1, 32 Stat. 388. In 1905, Congress extended the 1902 Act to "the portion of the State of Texas bordering upon the Rio Grande" that could be irrigated by water from the proposed reservoir at Elephant Butte. Act of Feb. 25, 1905, ch. 798, 33 Stat. 814. The

Secretary of the Interior (Secretary) was authorized to proceed with construction of the dam only after determining that there was sufficient assessable (*i.e.*, irrigable) land in New Mexico and Texas to "render the project feasible and return to the [government] the cost of the enterprise." *Ibid.* Interior determined that there were 155,000 acres of land that could be supplied with water from the reservoir and therefore could be assessed for the cost of construction. U.S. Geological Survey, *Fifth Annual Report of the Reclamation Service 1906*, H.R. Doc. No. 204, 59th Cong., 2d Sess. 220, 223 (1906); see *Joint Investigation* 83.

With the project approved, the United States proceeded to acquire rights and enter into contracts necessary to ensure its success. Reclamation took the steps necessary to obtain water rights under New Mexico law for the Elephant Butte Reservoir and associated downstream diversions—together known as the Rio Grande Project. See *Joint Investigation* 73; Reclamation Act § 8, 32 Stat. 390 (requiring Interior to "proceed in conformity" with state and territorial law governing the appropriation of water). The law of the New Mexico Territory authorized the United States to secure water for reclamation project purposes by filing notices of intent with the territorial engineer. See 1907 N.M. Laws 85-86; 1905 N.M. Laws 277. In 1906, the United States filed a notice stating that it intended to use 730,000 acre-feet per year from the Rio Grande, to be diverted and stored by the Project in a reservoir with a capacity of two million acre-

feet. Rep. 103-104.[1] In 1908, the United States provided a further notice that it intended to use "[a]ll of the the unappropriated water" of the Rio Grande and its tributaries. Rep. 106 (citation and emphasis omitted). By operation of the territorial legislation, the "waters so described" by the United States would not be "subject to a further appropriation under the laws of the Territory." 1907 N.M. Laws 85-86; see 1905 N.M. Laws 277.

Next, the United States and Mexico resolved their dispute over irrigation shortages by entering into a treaty. See Convention Between the United States and Mexico Providing For the Equitable Distribution of the Waters of the Rio Grande For Irrigation Purposes (1906 Treaty), May 21, 1906, U.S.-Mex., 34 Stat. 2953. In Article I of the 1906 Treaty, the United States agreed to provide Mexico with 60,000 acre-feet of water per year from storage in Elephant Butte Reservoir. 34 Stat. 2953-2954. Article II of the treaty provides that in cases of extraordinary drought, "the amount [of water] delivered to the Mexican Canal shall be diminished in the same proportion as the water delivered to lands under [the] irrigation system in the United States." 34 Stat. 2954.

Reclamation secured payment of the assessments on the Project's irrigable acreage by entering into a contract with two water user associations—the entities now known as Elephant Butte Irrigation District (EBID) in New Mexico, and El Paso County Water Improvement District No. 1 (EPCWID) in Texas. See *Joint Investigation* 83; see also Reclamation Act § 4,

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[1] An acre-foot is a quantity of water sufficient to cover one acre of land with one foot of water. *Kansas* v. *Nebraska*, 135 S. Ct. 1042, 1051 n.2 (2015).

32 Stat. 389 (authorizing Interior to enter into contracts with entities representing private landowners to recover charges); see Bureau of Reclamation, U.S. Dep't of the Interior, *Contract Between the United States of America and the Elephant Butte Water Users' Association and the El Paso Valley Water Users' Association for Project Construction and Repayment of Construction and Operation and Maintenance Charges* (June 27, 1906).[2]

3. Construction of the dam at Elephant Butte began in 1910. Elephant Butte Reservoir, the largest storage facility, and a canal system and diversion dams, were completed in 1916. *Joint Investigation* 73. A system of drains was added by 1925, and construction of a second storage facility, Caballo Reservoir, was completed below Elephant Butte Reservoir in 1938. *Id.* at 73, 85. The Project extends over a distance of 250 miles from San Marcial, New Mexico (a former gaging station upstream of Elephant Butte) to Fort Quitman, Texas. *Id.* at 21. The Project adds a total storage capacity to the Rio Grande of over two million acre-feet. *Id.* at 15.

The Project is designed to deliver more water than it releases from Elephant Butte and Caballo Reservoirs. That is because historically some of the water supplied to Project water users in New Mexico seeps

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[2] Under the Reclamation Act, contracts with the Secretary were formed through petitions filed by individual water users. Those individual petitions were generally replaced with contracts between water users' organizations and the Secretary. See, *e.g.*, 43 U.S.C. 423d, 423e, 477. Regardless of whether the contracts were between the Secretary and individuals or the Secretary and water users' organizations, a contract was required to obtain Reclamation water.

into the ground or flows off agricultural fields into drains and returns to the river. See *Third Annual Report* 425 (noting that the irrigable acreage in New Mexico was "all * * * tributary to" the land in Texas). The water returning to the river after initial use for irrigation (referred to as "return flow") becomes part of the water that is available for diversion by Project beneficiaries downstream. See, *e.g.*, *Montana* v. *Wyoming*, 563 U.S. 368, 380-384 (2011) (describing the doctrine of recapture). Return flows have historically been a significant part of the Project's deliveries. See *Joint Investigation* 47-49, 55, 100; *id.* at 49 (in the Elephant Butte-Fort Quitman section of the Rio Grande, "the return water of each subvalley becomes available to that next lower as far as the Tornillo heading of the Rio Grande Project"); *ibid.* ("In estimating the water supply for the major units of the upper basin under given future conditions of irrigation development, the return water is an important consideration.").

4. In 1937, Congress authorized the Secretary to enter into a contract with the two districts, under which the districts would be relieved of the construction costs associated with power development at Elephant Butte dam in exchange for conveyance by the districts of all of their "right, title, interest, and estate in the use of said dam and other project works, including the project water supply," for the development of hydroelectric energy. Interior Dep't Appropriation Act, 1938, ch. 570, 50 Stat. 564. In 1937, the Secretary entered into a contract with each district in accordance with that congressional authorization. See Bureau of Reclamation, U.S. Dep't of the Interior, *Contract Between the United States of America and*

EBID for the Adjustment of Construction Charges and Cancellation of Power Privilege Agreement (Nov. 9, 1937); Bureau of Reclamation, U.S. Dep't of the Interior, *Contract Between the United States and the EPCWID Adjusting Constructions Charges and for Other Purposes* (Nov. 10, 1937).

On February 16, 1938, EBID and EPCWID entered into a contract under which each district would receive water and pay charges in proportion to its share of the Project's 155,000 irrigable acres: EBID would pay charges on 88,000 irrigable acres in New Mexico, and EPCWID would pay charges on 67,000 acres in Texas. Contract Between EBID and EPCWID 1 (Rep. DVD Doc. 12). The 1938 contract provides that "in the event of a shortage," distribution from the Project would, "so far as practicable, be made in proportion of 67/155 thereof to the lands within [EPCWID], and 88/155 to the lands within [EBID]." *Ibid.* Those proportions are roughly equivalent to 57% for EBID in New Mexico and 43% for EPCWID in Texas. The Assistant Secretary of the Interior approved the agreement. *Id.* at 2.

Today, Reclamation plans Project releases pursuant to the 1906 Treaty with Mexico and the 1938 contract between EBID and EPCWID, and also pursuant to a settlement agreement entered into by Reclamation, EBID, and EPCWID. See Bureau of Reclamation, U.S. Dep't of the Interior, *Continued Implementation of the 2008 Operating Agreement for the Rio Grande Project, New Mexico and Texas, Final Environmental Impact Statement* 4-9 (Sept. 30, 2016) (2008 Operating Agreement).[3] Under the 2008 Oper-

[3] Available at https://www.usbr.gov/uc/envdocs/eis/pdf/2008OperatingAgreementRioGrandeEIS_Final.pdf.

ating Agreement, Reclamation uses a regression analysis showing how much water should be available for delivery, accounting for return flows, from a given volume of water released from Project storage based on 1951-1978 hydrological conditions. *Id.* at 6-8. After subtracting Mexico's share of the water, Reclamation assigns 43% of the available water to EPCWID and 57% of the water to EBID. *Id.* at 4-5.[4]

D. The Rio Grande Compact

1. The establishment of the Project helped to address concerns about water supply in southern New Mexico and western Texas by providing a reliable irrigation system. The embargo on use of federal land for diversion works in Colorado and New Mexico was lifted in 1925, however, and operation of the Project did not address concerns about development in Colorado and in New Mexico upstream of Elephant Butte Reservoir that was depleting the water supply to the Project. *Joint Investigation* 67. Accordingly, in 1929, Congress authorized Colorado, New Mexico, and Texas to negotiate and enter into, subject to congressional approval, a compact or agreement "providing for an equitable division and apportionment" of the waters of the Rio Grande and its tributaries. Act of Mar. 2, 1929 (1929 Act), ch. 520, 45 Stat. 1502. Congress gave its consent to the negotiation of a compact "upon condition that a representative of the United States[,] * * * to be appointed by the President, shall participate in the negotiations." § 2, 45 Stat. 1502. The federal representative was to "represent the interests

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[4] New Mexico has filed a suit in federal district court to challenge the 2008 Operating Agreement. See *New Mexico* v. *United States*, No. 11-cv-0691 (D.N.M. filed Aug. 8, 2011).

of the government * * * so far as they are affected by the [1906 Treaty] with Mexico * * * and the investment which the government has in the Rio Grande project in New Mexico and Texas." Rep. 120 (citation omitted).

To maintain the status quo on the river during the negotiations, the States of Colorado, New Mexico, and Texas agreed to an interim compact, which Congress approved. Act of June 17, 1930 (1930 Act), ch. 506, 46 Stat. 767. Article VII(a) of the interim compact called for a commission of three members composed of a representative of each State for purposes of concluding a compact "for the equitable apportionment of the use of the waters of the Rio Grande among said States." 46 Stat. 771. The interim compact also provided for a federal representative, appointed by the President, to sit with the commission. *Ibid.* Pending completion of a final compact, the commission was to "equitably apportion the waters of the Rio Grande as of conditions obtaining on the river and within the Rio Grande Basin" in 1929. Art. VII(b), 46 Stat. 771. New Mexico "agree[d]" in the interim compact that it would "not cause or suffer the water supply of the Elephant Butte Reservoir to be impaired by new or increased diversion or storage within the limits of New Mexico unless and until such depletion is offset by increase of drainage return." Art. XII, 46 Stat. 772.

In 1935, when the parties were unable to reach a permanent agreement, the interim compact was extended to June 1, 1937. Act of June 5, 1935, ch. 177, 49 Stat. 325; see *Joint Investigation* 8-9. It was later extended to October 1, 1937. Rio Grande Compact Commission, *Proceedings of Rio Grande Compact Commission held in Santa Fe, New Mexico* 24 (Mar.

3-4, 1937) (Rep. DVD Doc. 4); *Joint Investigation* 9. During that time, the federal National Resources Committee appointed a board to review the situation and recommend appropriate action. *Joint Investigation* 10.[5] The board gathered facts about "the available water supply, the water uses and requirements, and the possibilities of additional water supplies by storage, importations[,] and salvage of present losses and wastes." *Id.* at 11. In 1938, the National Resources Committee released the results of its investigation in the comprehensive *Joint Investigation* report. With that information, and with the participation of a federal representative, see 1930 Act Art. VII(a), 46 Stat. 771, the States were able to negotiate a permanent compact. Rio Grande Compact Commission, *Proceedings of the Rio Grande Compact Commission held at Santa Fe, New Mexico* (Mar. 3-18, 1938) (Rep. DVD Doc. 8).

2. On March 18, 1938, the States executed the Rio Grande Compact. Congress approved the Compact the following year. Ch. 155, 53 Stat 785. The Compact's preamble states that Colorado, New Mexico, and Texas entered into the Compact "to remove all causes of present and future controversy among these States * * * with respect to the use of the waters of the Rio Grande above Fort Quitman, Texas," and "for

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[5] In 1935, the National Resources Committee was established by Executive Order and was composed of the Secretaries of the Interior (who served as Chair), War, Agriculture, Commerce, and Labor, the Federal Emergency Relief Administrator, and three additional members appointed by President Roosevelt. Exec. Order No. 7065 (1935), *reprinted in The Public Papers and Addresses of Franklin D. Roosevelt, 1935*, at 242-248 (Samuel I. Roseman ed., 1938). The National Resources Committee replaced a National Resources Board established in 1934. *Ibid.*

the purpose of effecting an equitable apportionment of such waters." *Ibid.*

Article III of the Compact requires Colorado to deliver water at the New Mexico state line in an amount determined by schedules that correspond to water quantities at various gaging stations. 53 Stat. 787-788.

Article IV of the Compact requires New Mexico to deliver water at San Marcial, New Mexico—a gaging station upstream of Elephant Butte Reservoir—in an amount that is similarly determined by a schedule. 53 Stat. 788. In 1948, the Rio Grande Compact Commission, established under Article XII of the Compact, 53 Stat. 791, relocated the gage for measuring New Mexico's delivery obligation from San Marcial to Elephant Butte Reservoir. Tex. Compl. ¶ 13; N.M. Mot. to Dismiss 11 n.2.

Article VI of the Compact establishes a mechanism for adjusting the delivery requirements of Colorado and New Mexico from year to year. 53 Stat. 789-790. The Compact compensates New Mexico and Colorado for over-deliveries and penalizes them for under-deliveries through a system of credits and debits. It establishes limits on the total amount of credits and debits that an upstream State may accrue, and also requires New Mexico and Colorado each to "retain water in storage [upstream of Elephant Butte Reservoir] at all times to the extent of its accrued debit." 53 Stat. 789.

Article VII of the Compact provides that Colorado and New Mexico may not store additional water in reservoirs constructed after 1929 "whenever there is less than 400,000 acre feet of usable water in project

storage,"[6] unless actual releases from the Project from the beginning of the calendar year have aggregated to more than an average of 790,000 acre-feet per year. 53 Stat. 790.

Article VIII of the Compact permits Texas to demand that Colorado and New Mexico release water from storage in reservoirs constructed after 1929 to the amount of accrued debits sufficient to bring the quantity of usable water in the Project to 600,000 acre-feet. 53 Stat. 790. The release of stored water under Article VIII is to be made at the greatest rate practicable and in amounts sufficient to allow for "a normal release of 790,000 acre feet * * * from project storage in that year." *Ibid.*

The combined capacity of Elephant Butte Reservoir and other reservoirs "below Elephant Butte and above the first diversion to lands of the Rio Grande Project" is referred to in the Compact as "[p]roject [s]torage." Art. I(k), 53 Stat. 786. The only other such reservoir is Caballo Reservoir, described above. See p. 9, *supra*. The Compact fixes the maximum amount of water in project storage at 2,638,860 acre-feet. Art. I(k), 53 Stat. 786. The Compact defines "[u]sable [w]ater" as water "in project storage" that is "available for release in accordance with irrigation demands, including deliveries to Mexico." Art. I(*l*), 53 Stat. 786.

Article XI of the Compact states that Texas and New Mexico agree that upon the Compact's effective date, "all controversies between said States relative to the quantity or quality of the water of the Rio Grande are composed and settled." 53 Stat. 790-791. It fur-

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[6] "Usable [w]ater" is defined in Article I(*l*) of the Compact, 53 Stat. 786. See p. 16, *infra*.

ther provides that "nothing herein shall be interpreted to prevent recourse by a signatory state to the Supreme Court of the United States for redress should the character or quality of the water, at the point of delivery, be changed hereafter by one signatory state to the injury of another." Art. XI, 53 Stat. 791.

Article XVI of the Compact provides that "[n]othing in this Compact shall be construed as affecting the obligations of the United States of America to Mexico under existing treaties or to the Indian tribes, or as impairing the rights of the Indian tribes." 53 Stat. 792.

E. The State Water Adjudication

New Mexico has contended in this suit that state law governs releases from Project storage, such that any remedy for depletions of return flows and hydrologically connected groundwater should be addressed through an enforcement action in state court. A New Mexico state court is currently determining the rights to the water of the Rio Grande between Elephant Butte Reservoir and the New Mexico-Texas state line. See *New Mexico* v. *Elephant Butte Irrigation Dist.*, CV-96-888 (N.M. 3d Jud. Dist. filed Sept. 24, 1996) (*Lower Rio Grande Adjudication*).[7] The United States' water rights for the Project are being adjudicated in that proceeding.[8]

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[7] Docket entries for the state water adjudication are available at https://lrgadjudication.nmcourts.gov.

[8] See Lower Rio Grande Adjudication, *SS-97-104; US Interest (Reverse Chronological Order)*, https://lrgadjudication.nmcourts.gov/ss-97-104-us-interest-reverse-chronological-order.aspx (last visited June 9, 2017) (online docket). The United States filed an action to quiet title to water for the Project in federal district court

The state court has concluded that the United States' water right for the Project is a surface right only, and that the Project is not entitled to "groundwater." See Order Granting the State's Mot. to Dismiss the U.S. Claims to Groundwater and Denying the U.S. Mot. for Summ. J., *Lower Rio Grande Adjudication*, *supra* (filed Aug. 16, 2012) (8/16/12 Order). The court acknowledged that there is "an interactive relationship between groundwater and surface water * * * within many New Mexico stream systems, including the Rio Grande reach downstream of Elephant Butte Dam," but the court stated that New Mexico law "nevertheless recognizes surface water and groundwater as distinct entities with distinct administrative schemes." *Id.* at 4.

The state court acknowledged that the Project relies on "reuse of water" in that the Project typically is able to deliver more water than is released from project storage. 8/16/12 Order 6. The court further acknowledged that "seepage and return flows from a federal reclamation project that are captured and reused may be identified as project water." *Id.* at 7. The court concluded, however, that under New Mexico law, when surface water, "through percolation, seepage or otherwise, reaches an underground reservoir

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on the ground that because the Project has interstate and international obligations to deliver water, the Project right should be fully adjudicated in one proceeding rather than in separate proceedings in New Mexico and Texas state courts. See 97-cv-00803 Docket entry No. (Docket No.) 245, at 16-17, 21 (D.N.M. Aug. 22, 2000). That action has been stayed pending the outcome of the proceeding in New Mexico state court. Docket No. 281 (June 12, 1997); see *United States* v. *New Mexico*, 624 Fed. Appx. 671 (10th Cir. 2015) (providing summary of case history and affirming denial of motion to lift stay).

and thereby loses its identity as surface water, such waters become public under [New Mexico law] and are subject to appropriation in accordance with applicable statutes." *Ibid.* (quoting *Kelley* v. *Carlsbad Irrigation Dist.*, 415 P.2d 849, 853 (N.M. 1966) (per curiam)). Thus, under the state court's ruling, the Project is not entitled to a groundwater right, and the protection of Project seepage and return flow in the ground from appropriation can only be had upon an administrative determination by the State Engineer that the water has not "lo[st] its identity as [Project] surface water." *Ibid.* (citation omitted).

The United States also requested that the state court's quantification of the Project's water right should include "a right to deliver to Mexico" and "a right to deliver to Project facilities in Texas" an amount of up to 376,000 acre-feet per year, as recognized by a Texas water-rights decree. U.S. Mem. in Supp. of Mot. for Summ. J., *Lower Rio Grande Adjudication*, *supra* (filed Apr. 24, 2013); see *In re Adjudication of Water Rights in the Upper Rio Grande Segment of the Rio Grande Basin*, No. 2006-3291 (327th Jud. Dist. Tex. Oct. 30, 2006). The court declined to recognize the Project's right to deliver water sufficient to satisfy the Texas decree. Order, *Lower Rio Grande Adjudication*, *supra* (filed Feb. 17, 2014). The court explained that "[a]djudicating the specific quantity of 376,000 acre-feet for delivery within Texas is outside of the scope of the elements that can properly be determined in this proceeding." *Id.* at 4. The court did not mention the Project's need to deliver water to Mexico.

Earlier this year, the state court determined that the priority date for the Project's water rights is

March 1, 1903. See Findings of Fact and Conclusions of Law 55, *Lower Rio Grande Adjudication*, *supra* (filed Apr. 17, 2017).

F. The Current Controversy

1. In this original action, Texas alleges that New Mexico is violating the Compact by authorizing the diversion of surface water and hydrologically connected groundwater downstream of Elephant Butte Reservoir. Tex. Compl. ¶ 18. Texas contends that once New Mexico delivers water to Elephant Butte Reservoir, as required by Article IV of the Compact, the water "is allocated and belongs to Rio Grande Project beneficiaries in southern New Mexico and in Texas" and is to be distributed by the Project according to federal contracts. *Id.* ¶ 4. Texas alleges that the deliveries to which it is entitled under the Compact cannot be assured if New Mexico water users are allowed to intercept surface water and groundwater hydrologically connected to the Rio Grande below Elephant Butte Reservoir in excess of Project allocations. *Id.* ¶ 11.

Texas further contends that such use has diminished Project return flows and decreased water available to Project beneficiaries, to Texas's detriment. Tex. Compl. ¶¶ 18, 19. In particular, Texas alleges that the surface water and groundwater depletions allowed by New Mexico "have increased over time until, in 2011, they amounted to tens of thousands of acre-feet of water annually." *Id.* ¶ 18. Those extractions, Texas maintains, "create deficits in tributary underground water which must be replaced before the Rio Grande can efficiently deliver Rio Grande Project water," which in turn requires additional releases from Elephant Butte Reservoir and thereby decreases

the amount of water stored in the reservoir for future delivery to Project users. *Ibid.* Texas alleges that New Mexico's actions have resulted in "ongoing, material depletions of flows of the Rio Grande at the New Mexico-Texas state line, causing substantial and irreparable injury to Texas." *Id.* ¶ 19.

Texas requests declaratory relief, a decree requiring New Mexico to deliver water to Texas in accordance with the Compact, and damages. Tex. Compl. ¶¶ 15-16.

2. After the Court granted Texas leave to file its complaint, the United States filed a motion for leave to intervene in this action as a plaintiff, a proposed complaint in intervention, and a memorandum in support of the motion. The Court granted the United States leave to intervene. 134 S. Ct. 1783.

The United States agrees with Texas that "New Mexico has allowed the diversion of surface water and the pumping of groundwater that is hydrologically connected to the Rio Grande downstream of Elephant Butte Reservoir" in excess of the Project allocations that secure Texas's Compact apportionment. U.S. Compl. ¶ 13. The United States further alleges that the diversions in New Mexico violate federal reclamation law to the extent that water users are intercepting Project deliveries in the absence of a contract with the United States, or in excess of contractually authorized amounts. *Id.* ¶¶ 12-13.

The United States contends that the unlawful depletion of surface water and groundwater in New Mexico below Elephant Butte "affects surface water deliveries" to downstream Project beneficiaries. U.S. Compl. ¶ 14. The United States agrees with Texas that, as a consequence, the United States may have to

release additional water from storage to offset the anticipated depletions, reducing the water available in storage for future deliveries. *Ibid.* The United States also alleges that the "[u]ncapped use of water" sanctioned by New Mexico below Elephant Butte Reservoir "could reduce [the Project's] efficiency to a point where 43% of the available water could not be delivered to EPCWID, and 60,000 acre-feet per year could not be delivered to Mexico." *Id.* ¶ 15.

The United States seeks relief from New Mexico's interference with the operation of the Project. The United States asks the Court to declare that, "as a party to the Compact," New Mexico (i) may not permit water users who do not have contracts with the Secretary to intercept or interfere with delivery of Project water to Project beneficiaries or to Mexico, (ii) may not permit Project beneficiaries in New Mexico to intercept or interfere with Project water in excess of federal contractual amounts, and (iii) must affirmatively act to prohibit or prevent such interception or interference. U.S. Compl. 5. The United States also requested prohibitory and mandatory injunctive relief to the same effect. *Ibid.* The United States' complaint does not seek monetary relief or an apportionment of water for the United States.

3. New Mexico filed a motion to dismiss the complaints filed by Texas and the United States, in the nature of a motion under Federal Rule of Civil Procedure 12(b)(6). New Mexico contends that the complaints fail to state a claim upon which relief can be granted because no Compact provision prohibits New Mexico from interfering with Project deliveries to Texas water users after New Mexico delivers water to Elephant Butte Reservoir. N.M. Mot. to Dismiss 27-

40. New Mexico contends that the Project's water rights below Elephant Butte Reservoir instead are controlled by state law, *id.* at 48-58, and that any remedy for interference with Project deliveries on the part of New Mexico water users therefore must be left to a state-law suit brought by the United States against any offending water users, *id.* at 37-40, 59-63. In its reply brief, New Mexico argued that if the Court dismisses Texas's claims, the United States' claims should also be dismissed because the United States "is not a party to the Compact." N.M. Reply Br. 28.

G. The First Interim Report Of The Special Master

On August 19, 2015, the Special Master heard argument on New Mexico's motion to dismiss. 8/19/15 Tr. The hearing also addressed motions to intervene filed by EBID and EPCWID. On July 1, 2016, the Master issued a draft first interim report to the parties and invited corrections of a technical or factual nature. Case Mgmt. Order No. 11. On February 9, 2017, the Master issued the First Interim Report. On March 20, 2017, the Court ordered the report filed and allowed the parties to file exceptions. 137 S. Ct. 1363.

1. The Master has recommended that the Court deny New Mexico's motion to dismiss the complaint filed by Texas. Rep. 187-217.

a. The Master concluded that the plain text of Article IV of the Compact, which establishes an "obligation" of New Mexico to "deliver" a quantity of water to Elephant Butte Reservoir, "requires New Mexico to relinquish control and dominion over the water it deposits in Elephant Butte Reservoir." Rep. 197; see Rep. 195-198. The Master rejected New Mexico's contention that nothing in the Compact prohibits New

Mexico from allowing or authorizing diversions of water downstream of Elephant Butte Reservoir. *Ibid.* The Master explained that New Mexico's interpretation "disregards the text of Article IV" and renders the terms "obligation" and "delivery" void. Rep. 197.

b. The Master next concluded that the structure of the Compact supports Texas's claim. Rep. 198-203. The Master explained that Article I(*l*) of the Compact, which defines "[u]sable [w]ater" as water in project storage that is "available for release in accordance with irrigation demands, including deliveries to Mexico," 53 Stat. 786, demonstrates that the Compact "protects the water that is released from Elephant Butte in order for it to reach its intended destination." Rep. 200. The Master further explained that Article VIII, which permits Texas to demand that Colorado and New Mexico release water from storage in certain circumstances to bring the quantity of usable water in the Project to 600,000 acre-feet, 53 Stat. 790, is designed to ensure that the Project can "meet [its] contractual irrigation demands." Rep. 201; see Rep. 200-201. Accordingly, the Master concluded, the Compact "do[es] not simply require New Mexico to make water deliveries to Elephant Butte Reservoir." Rep. 201. Rather, the Compact "is a comprehensive agreement, the text and structure of which equitably apportion water to Texas, as well as to Colorado and New Mexico, and provides a detailed system of accountability to ensure that each State continues to receive its equitable share." *Ibid.*

The Master noted that New Mexico's reading of the Compact would "leave[] the question of Texas's equitable apportionment" under the Compact "an open, major source of controversy." Rep. 202. That reading

would be contrary to the basic purpose of the Compact, which is "to remove all causes of present and future controversy among these States * * * with respect to the use of the waters of the Rio Grande above Fort Quitman, Texas," and to "effect[] an equitable apportionment of such waters." Rep. 202-203 (emphasis omitted) (quoting Compact 53 Stat. 785).

c. The Master further concluded that the purpose and history of the Compact confirm that the States intended to use the Project "as the vehicle to guarantee delivery of Texas's and part of New Mexico's equitable apportionment of the stream." Rep. 204; see Rep. 203-209. The Master explained that the Compact "was the culmination of years of national and international problem-solving, litigation, legislation, and negotiation by irrigators, engineers, and politicians to irrigate lands in the Elephant Butte-Fort Quitman section of the Upper Rio Grande Basin." Rep. 204. The Master reviewed the negotiating history and concluded it was "plain that the Commission fully relied upon the existing Rio Grande Project to impart Texas's and lower New Mexico's respective equitable apportionments of Rio Grande waters." Rep. 209. The Master further reasoned that, in light of this Court's equitable apportionment power and an original action filed by Texas in 1935 claiming violations of the 1929 interim compact,[9] "it is unfathomable that Texas 'would trade away its right to the Court's equitable apportionment,' had it contemplated then that New Mexico would be able to disown its obligations under the 1938 Compact and simply recapture water it delivered to the Project, destined for Texas." Rep.

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[9] See *Texas* v. *New Mexico*, 296 U.S. 547 (1935) (granting Texas leave to file a bill of complaint).

209 (quoting *Kansas* v. *Nebraska*, 135 S. Ct. 1042, 1052 (2015)).

d. The Master rejected New Mexico's contention that state law governs the distribution of water delivered by the Project. Rep. 210-217. Based on this Court's pronouncement that an equitable apportionment in a compact "is binding upon the citizens of each State and all water claimants," *Hinderlider* v. *La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 106 (1938), the Master concluded that New Mexico, by entering into the Compact, "relinquished its own rights to the water it delivers in Elephant Butte Reservoir," Rep. 216, including the right to allow for the appropriation of those waters by the inhabitants of New Mexico under state law, Rep. 211-217. Therefore, "any question of the rights of any signatory State to water apportioned by the 1938 Compact * * * must be decided pursuant to the original and exclusive jurisdiction of the Supreme Court." Rep. 216 (citing *Hinderlider*, 304 U.S. at 110).

e. For purposes of the motion to dismiss, the Master assumed as true Texas's allegations that New Mexico is impairing project deliveries by diverting surface water and groundwater hydrologically connected to the Rio Grande below Elephant Butte Reservoir. Rep. 201. Because the Master concluded that the Compact forbids New Mexico from intercepting Project deliveries to Texas, he concluded that Texas's complaint states a plausible claim for which relief can be granted. Rep. 217.

2. The Master recommended that the Court grant in part and deny in part New Mexico's motion to dismiss the complaint in intervention filed by the United States. Rep. 217-237.

a. The Master concluded that the United States cannot state a claim under the Compact because the Compact is an agreement among Colorado, New Mexico, and Texas, and does not apportion water to the United States. Rep. 229-231. The Master concluded that, although the States used the Project "as the sole vehicle by which to apportion Rio Grande waters to Texas and New Mexico below Elephant Butte Reservoir," that choice by the States does not give the United States a "right of action under the * * * Compact." Rep. 231. According to the Master, that conclusion follows from *Nebraska* v. *Wyoming*, 515 U.S. 1 (1995), under which "the United States would have to assert 'violations [which] have the effect of undermining [its own] apportionment [of water]'" in order to state a claim. Rep. 231 (brackets in original) (quoting *Nebraska* v. *Wyoming*, 515 U.S. at 16).

b. The Master further concluded, however, that the United States stated a plausible claim against New Mexico under federal reclamation law. Rep. 231-237. The Master assumed as true the United States' allegation that New Mexico has allowed the diversion of Project water by users who do not have contracts with the United States or are using water in excess of contractual amounts. Rep. 232 (citing U.S. Compl. ¶ 13). The Master explained that "[f]ederal reclamation law has long established that only entities having contracts with the United States may receive deliveries of water from a reclamation project," and "th[e] requirement of a contract for project water extends to seepage and return flows." Rep. 232 (citing *Bean* v. *United States*, 163 F. Supp. 838 (Ct. Cl.), cert. denied, 358 U.S. 906 (1958)). The Master recommended that the Court should exercise its original, non-exclusive

jurisdiction over suits between the United States and a State, see 28 U.S.C. 1251(b)(2), to consider and resolve a reclamation-law claim by the United States against New Mexico "for purposes of judicial economy." Rep. 234.

3. The Master recommended that the Court deny the motions to intervene filed by EBID and EPCWID. Rep. 237-278. The Master concluded that EBID's motion was procedurally deficient because it did not set forth any claims or defenses for which intervention was sought, nor did it seek any relief against either Texas or New Mexico. Rep. 247-251. The Master further concluded that EBID and EPCWID each failed to demonstrate "[a] compelling interest in [its] own right * * * which interest is not properly represented by" New Mexico or Texas, respectively. Rep. 251 (brackets in original) (quoting *South Carolina* v. *North Carolina*, 558 U.S. 256, 266 (2010)); see Rep. 251-264 (EBID); Rep. 270-277 (EPCWID).

SUMMARY OF ARGUMENT

The United States has stated a claim for declaratory and injunctive relief based on New Mexico's violation of the Compact. The United States may obtain such relief both because the Compact is a federal law that protects specific federal interests, and because the United States is an intended third-party beneficiary of the Compact.

A. To effectuate an equitable apportionment among Colorado, New Mexico, and Texas, the Compact incorporates and relies upon the Rio Grande Project, a federal reclamation project that is obligated to deliver water to Mexico and to irrigation districts in Texas and lower New Mexico. By enacting a requirement that New Mexico deliver water to Elephant

Butte Reservoir, and thus relinquish control over the water, the Compact protects the United States' ability to meet those obligations. Because the Compact protects federal interests that are harmed by New Mexico's violations of the Compact, the United States may seek declaratory and injunctive relief against New Mexico.

1. The United States can obtain declaratory and injunctive relief against New Mexico based on allegations that New Mexico is violating a federal statute that protects the United States' ability to comply with its treaty obligation to deliver Project water to Mexico. Ensuring that treaty obligations are not jeopardized by a State's violation of an interstate compact is a distinctively federal interest that is best presented by the United States in this original action. The United States properly intervened as a plaintiff to seek to enjoin conduct that violates the Compact to the detriment of the United States' ability to comply with its treaty obligation.

2. The United States may also obtain declaratory and injunctive relief against New Mexico's interference with Project operations that are protected by the Compact. The States agreed to use the Project as the vehicle to guarantee delivery of Texas's and part of New Mexico's equitable apportionment of the waters of the Rio Grande. By incorporating the Project into the equitable apportionment framework, the Compact protects the water that is released from the Project in order for it to reach its intended destination. The United States has a right and obligation protected by the Compact to deliver water to contract holders in Texas and lower New Mexico, and the United States may properly seek to enjoin New Mexico's interfer-

ence with Project operations, in violation of its Compact obligations.

3. The Master's conclusion that the United States could not bring a claim for injunctive relief under the Compact was based in part on an incorrect understanding that the United States has never before intervened as a plaintiff in an original action asserting that it has rights protected by a compact. The United States has intervened as a plaintiff in other original actions to protect its rights and duties pertaining to interstate streams. Nor does *Nebraska* v. *Wyoming*, 325 U.S. 589 (1945), 507 U.S. 584 (1993), and 515 U.S. 1 (1995), support the Master's conclusion that the United States must receive an apportionment of water to assert a claim for injunctive relief under the Compact. That case demonstrates that the United States can enforce an equitable apportionment decree that protects Reclamation project characteristics that are a necessary predicate to the apportionment of an interstate stream. The case also demonstrates that the United States should be permitted to bring a compact claim against a State that undermines the operation of an interstate compact to the detriment of federal interests that the Compact expressly protects.

B. For the same reasons that the United States may seek to enjoin violations of the Compact because it is a federal law that expressly incorporates and protects federal interests, the United States can also bring a claim for declaratory and injunctive relief against New Mexico as an intended third-party beneficiary of the Compact insofar as the Compact is viewed as a contract. The Compact protects the water that is released from the Project for it to reach its intended destination, which is Reclamation's respon-

sibility pursuant to contracts with irrigation districts and the 1906 Treaty. The Compact thus reflects the intention of the parties to benefit the United States directly.

ARGUMENT

This Court's original jurisdiction "extends to a suit by one State to enforce its compact with another State or to declare rights under a compact." *Texas* v. *New Mexico*, 462 U.S. 554, 567 (1983). The Court's jurisdiction also extends to controversies between the United States and a State. 28 U.S.C. 1251(b)(2). The Court therefore has jurisdiction over the United States' complaint in intervention in this suit brought by Texas against New Mexico and Colorado.

The Court has looked to the Federal Rules of Civil Procedure to inform procedures in original actions. See Sup. Ct. R. 17.2. Federal Rule of Civil Procedure 12(b)(6) provides for dismissal of a complaint that fails to state a claim upon which relief can be granted. Under Rule 12(b)(6), a court must proceed "on the assumption that all the allegations in the complaint are true." *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 555 (2007). The Court must decide whether, assuming the factual allegations in the complaint are true, the plaintiff has "state[d] a claim to relief that is plausible on its face." *Ashcroft* v. *Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570).

In this case, the United States has stated a claim for declaratory and injunctive relief based on New Mexico's violation of the Rio Grande Compact. The United States may obtain such relief both because the Compact is a federal law that incorporates and protects specific federal interests, and because the United States is, insofar as the Compact is considered as a

contract, an intended third-party beneficiary of the Compact. Under either theory—or both—the Court should reject the Master's conclusion that the United States cannot obtain declaratory or injunctive relief to enforce promises made by New Mexico in the Compact that protect important interests of the United States.

THE UNITED STATES MAY SEEK DECLARATORY AND INJUNCTIVE RELIEF AGAINST NEW MEXICO FOR VIOLATIONS OF THE RIO GRANDE COMPACT

The Special Master has recommended that the Court grant New Mexico's motion to dismiss the United States' complaint in intervention "to the extent that the United States cannot state a plausible claim under the 1938 Compact." Rep. 237. The Master reasoned that the United States does not have a "right of action under the * * * Compact" because the Compact did not apportion any water to the United States. Rep. 231; Rep. 229-231. For the reasons explained below, the Court should reject that recommendation.[10]

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[10] New Mexico did not move to dismiss the United States' complaint on those grounds. Rather, New Mexico moved to dismiss the United States' complaint on the same grounds that it moved to dismiss the complaint filed by Texas—that New Mexico's only obligation under the Compact is to deliver water to the Elephant Butte Reservoir, N.M. Mot. to Dismiss 27-40, and that its obligations with respect to water in New Mexico below Elephant Butte are governed by New Mexico state law, *id.* at 48-58. As a result, the Master reached the conclusion that the United States must have an apportionment of water before it may bring an action to enforce a compact without briefing from the parties on that issue.

A. The United States May Obtain Declaratory And Injunctive Relief To Protect Federal Interests That Are Harmed By New Mexico's Violation Of The Compact

The Master's conclusion that the United States could not state a claim under the Compact because it received no equitable apportionment appears to have been based in part on principles of contract law. See Rep. 193 (noting that "[i]nterstate compacts are construed as contracts under the principles of contract law") (brackets in original) (quoting *Tarrant Reg'l Water Dist.* v. *Herrmann*, 133 S. Ct. 2120, 2130 (2013)). Although interstate compacts in some respects are properly viewed as contracts among States, "an interstate compact is not just a contract; it is a federal statute enacted by Congress." *Alabama* v. *North Carolina*, 560 U.S. 330, 351 (2010); see *Kansas* v. *Nebraska*, 135 S. Ct. 1042, 1052 (2015). The Compact Clause of the United States Constitution provides that "[n]o State shall, without the Consent of Congress, * * * Compact with another State." U.S. Const. Art. I, § 10, Cl. 3; see *Texas* v. *New Mexico*, 462 U.S. at 564. When Congress gives its consent to a compact, the compact becomes "a law of the United States." *Texas* v. *New Mexico*, 462 U.S. at 564 (quoting *Cuyler* v. *Adams*, 449 U.S. 433, 438 (1981)).

To effectuate an equitable apportionment among Colorado, New Mexico, and Texas, the Compact incorporates and relies upon a federal reclamation project that is obligated to deliver water (i) to Mexico pursuant to a treaty and (ii) to irrigation districts in Texas and lower New Mexico pursuant to contracts that preexisted the Compact. By securing a promise from New Mexico to "deliver" Rio Grande water to Elephant Butte Reservoir, see Art. IV, 53 Stat. 788,

and thus relinquish control of the water, Rep. 195-197, the Compact protects the United States' ability to meet those obligations. See Rep. 200 (the Compact "protects the water that is released from Elephant Butte in order for it to reach its intended destination").

Congress gave its consent for the States to negotiate a compact on the condition that a federal representative appointed by the President participate in the negotiations, 1929 Act ch. 520, 45 Stat. 1502, and the federal representative's role in the negotiations was to ensure that those specific federal interests were protected, Rep. 120. Congress approved the Compact with those protections in place. See *Cuyler*, 449 U.S. at 439-440 (constitutional requirement that Congress must approve interstate compacts ensures that agreements between States do not infringe on federal interests). Because the Compact protects federal interests that are harmed by New Mexico's violations of the Compact, the United States may seek declaratory and injunctive relief against New Mexico.

1. The United States may seek relief against New Mexico to protect its treaty obligation to deliver Project water to Mexico

a. This Court has held that the United States may sue to enjoin state action that undermines interests protected by a federal statute or interferes with obligations of the United States under a treaty. In *Sanitary District of Chicago* v. *United States*, 266 U.S. 405 (1925), the United States brought an action to enjoin an Illinois corporation "from diverting water from Lake Michigan in excess of 250,000 cubic feet per minute; the withdrawal of that amount having been authorized by the Secretary of War." *Id.* at 423. The

United States contended that the corporation's withdrawal of more than the federally authorized amount, under the authority of a state statute, threatened the navigability of waters of the United States protected by the Rivers and Harbors Appropriation Act of 1899, ch. 425, 30 Stat. 1121. See *Sanitary Dist. of Chicago*, 266 U.S. at 423. The Court concluded that the United States could enjoin that conduct "not only to remove obstruction to interstate and foreign commerce," but also because depletion of the water implicated the United States' obligations to Canada under a boundary waters treaty. *Id.* at 425.

Similarly, in *United States* v. *County of Arlington*, 669 F.2d 925, appeal dismissed and cert. denied, 459 U.S. 801 (1982), the Fourth Circuit held that the United States could obtain declaratory relief and enjoin the City of Arlington, Virginia, from collecting taxes on real estate owned by the German Democratic Republic (GDR) to house the staff of its diplomatic mission and their families. *Id.* at 927-928. The court rejected the State's argument that the United States was required to join the GDR in the suit, explaining that the United States had sued "to vindicate its own policy and authority." *Id.* at 928. The court held that even though the United States had no pecuniary interest in the controversy, it could sue based upon its sovereign interest in complying with its obligations under the Vienna Convention on Diplomatic Relations, *done* Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95, and a bilateral agreement with East Germany. See *County of Arlington*, 669 F.2d at 928-929; see also, *e.g.*, *United States* v. *City of Glen Cove*, 322 F. Supp. 149, 152 (E.D.N.Y.) ("In the exercise of its constitutional responsibility for the conduct of foreign affairs, the

United States may sue to prevent state action which would violate a treaty obligation of the United States."), aff'd, 450 F.2d 884 (2d Cir. 1971); cf. *Washington* v. *Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 692-696 (1979) (holding that federal court could declare rights under an Indian fishing rights treaty in suit brought by the United States against the State of Washington).

b. Under those precedents, the United States can obtain declaratory and injunctive relief against New Mexico based on allegations that New Mexico is violating a federal statute that protects the United States' ability to comply with its treaty obligation to deliver Project water to Mexico. As described above (p. 5, *supra*), before the Project was constructed, Mexico had pressed claims against the United States based on recurring water shortages along the lower Rio Grande. *Joint Investigation* 8, 73. The problem was studied by the International Boundary Commission and later by the Reclamation Service, and the solution was to build a dam at Elephant Butte. That recommendation was "heartily endorse[d] and approve[d]" by attendees of the 1904 Irrigation Congress —including a delegation from Mexico—to resolve disputes over the waters of the Rio Grande. *Official Proceedings* 107. The Project was constructed in part to facilitate delivery of water to Mexico. Indeed, the United States is obligated by the 1906 Treaty to deliver 60,000 acre-feet of water per year to Mexico from storage in Elephant Butte Reservoir. Art. I, 34 Stat. 2953-2954.

The Compact protects the United States' ability to fulfill its treaty obligation by requiring New Mexico to "deliver," and thereby relinquish control of, a specific

quantity of water into "[p]roject [s]torage" in Elephant Butte Reservoir. Arts. I(k) and IV, 53 Stat. 786, 788; see Rep. 195-197. From there, it becomes "[u]sable [w]ater" that is controlled by Reclamation and released "in accordance with irrigation demands, including deliveries to Mexico." Art. I(*l*), 53 Stat. 786; see also Article XVI, 53 Stat. 792 ("Nothing in this Compact should be construed as affecting the obligations of the United States of America to Mexico under existing treaties.").

In its complaint in intervention, the United States identified its interest in ensuring that New Mexico water users downstream of Elephant Butte Reservoir do not intercept or interfere with delivery of Project water to Mexico, in violation of New Mexico's Compact obligations. The United States alleged that "extraction of water that is hydrologically connected to the Rio Grande below Elephant Butte Reservoir has an effect on the amount of water stored in the Project that is available for delivery to * * * Mexico" and that, even with the 2008 Operating Agreement in place, "[u]ncapped use of water below Elephant Butte Reservoir in New Mexico could reduce Project efficiency to a point where * * * 60,000 acre-feet per year could not be delivered to Mexico." U.S. Compl. ¶¶ 14-15; see U.S. Mem. in Supp. 8-9.

The United States further explained that, under Article II of the 1906 Treaty, in the case of extraordinary drought, the quantity of water that the United States must deliver to Mexico is tied to the quantity of surface water delivered to irrigation districts in the United States. See U.S. Mem. in Supp. 8-9 (citing Art. 11, 34 Stat. 2954). The United States explained that, "[w]here surface water deliveries to irrigation dis-

tricts in the United States are being reduced as a result of extractions by water users who either do not have contracts with the Secretary or are using water in excess of contractual amounts, the United States must carefully consider whether Article II of the treaty would allow a proportional reduction of its delivery obligation to Mexico during an extraordinary drought." *Ibid.*

Ensuring that treaty obligations are not jeopardized by a State's violation of an interstate compact is a "distinctively federal interest[]" that is "best presented by the United States" in this original action. *Maryland* v. *Louisiana*, 451 U.S. 725, 745 n.21 (1981). Indeed, the United States intervened as a plaintiff in a previous original action brought by Texas against New Mexico to enforce the Pecos River Compact, Act of June 8, 1949, ch. 184, 63 Stat. 159, in part to protect its treaty obligations to Mexico. See U.S. Mot. for Leave to Intervene as Pl., Compl. in Intervention, and Mem. in Supp. of Mot. for Leave to Intervene as Pl., *Texas* v. *New Mexico*, No. 65, Orig. (filed Aug. 20, 1975); *Texas* v. *New Mexico*, 421 U.S. 927 (1975) (No. 65, Orig.) (granting United States' motion for leave to intervene).[11] The United States explained that it had "substantial rights and obligations with respect to the waters of the Pecos River stream system—including an international responsibility to assure deliveries to the Republic of Mexico."[12] U.S. Mem. in Supp. of Mot. for Leave to Intervene as Pl. at 10, *Texas* v. *New*

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[11] The Pecos River is a tributary of the Rio Grande, entering it near Langtry, Texas. *Texas* v. *New Mexico*, 462 U.S. at 556.

[12] See Treaty between the United States and Mexico Respecting Utilization of Waters of the Colorado and Tijuana Rivers and of the Rio Grande, Nov. 27, 1945, U.S.-Mex., 59 Stat. 1219.

Mexico, *supra* (No. 65, Orig.). Likewise in this case, the United States properly intervened as a plaintiff to enjoin conduct that violates an interstate compact to the detriment of the United States' ability to comply with a treaty obligation, which is protected by the Compact.

2. The United States may seek relief against New Mexico to protect the operation of the Rio Grande Project and its contractual obligation to deliver Project water to EBID and EPCWID

a. Furthermore, the United States may obtain declaratory and injunctive relief based on New Mexico's interference with Project operations that are protected by the Compact. Under the Compact, New Mexico is obligated to deliver water into "[p]roject [s]torage" at Elephant Butte Reservoir. Arts. I(k) and IV, 53 Stat. 786, 788. That reservoir was already authorized, constructed, and delivering water pursuant to contracts with irrigation districts in southern New Mexico and western Texas (and pursuant to the 1906 Treaty with Mexico) before the States entered into the Compact. See pp. 5-12, *supra*. As the Master correctly recognized, "the signatory States intended to use the Rio Grande Project as the vehicle to guarantee delivery of Texas's and part of New Mexico's equitable apportionment of the stream." Rep. 204; see Rep. 203-209. The Compact protects the Project's operations by designating the water in "[p]roject [s]torage," which includes all water delivered into Elephant Butte Reservoir by New Mexico, as "[u]sable [w]ater" that is "available for release in accordance with irrigation demands, including deliveries to Mexico." Art. I(k) and (*l*), 53 Stat. 786. By incorporating into the equitable apportionment framework the Project and its

preexisting contracts and treaty commitments governing irrigation demands, the Compact "protects the water that is released from Elephant Butte in order for it to reach its intended destination." Rep. 200.

b. Like the United States' ability to fulfill its treaty obligations, the United States' ability to protect the integrity of Project operations that are incorporated into the Compact's equitable apportionment framework is a distinctively federal interest that warrants intervention by the United States. *Maryland* v. *Louisiana*, 451 U.S. at 745 n.21. The Compact relies on the United States to allocate water downstream of Elephant Butte Reservoir between water users in southern New Mexico and western Texas, and thus between the States of New Mexico and Texas, and the United States has a right and obligation protected by the Compact to deliver Project water to contract holders in both States in accordance with irrigation demands. The United States may properly seek to enjoin New Mexico's interference with its Project operations and contracts, in violation of New Mexico's Compact obligations.

3. The Special Master's conclusion that the United States cannot state a claim under the Compact is based on an incomplete understanding of the United States' participation in original actions

a. The Master's conclusion that the United States cannot bring a claim to enforce the Compact was based in part on an incomplete understanding of the United States' participation in original actions. The Master stated that, "historically, the United States has participated primarily as *amicus curiae*" in original actions where States invoke the Court's original jurisdiction "to apportion interstate streams or to

enforce compacts or decrees apportioning those streams." Rep. 220. According to the Master, this is "the first time in its history of litigating within original actions" that the United States "has intervened as a *party plaintiff*" asserting that it has rights protected by a compact. Rep. 229. That is incorrect.

As noted above, pp. 38-39, *supra*, the United States intervened as a plaintiff in a previous dispute between Texas and New Mexico over the Pecos River Compact, in part to protect its obligation to deliver water to Mexico pursuant to a treaty. In its motion to intervene in that case, the United States also sought to protect its "rights and duties appertaining to federal lands and facilities along the stream or within the watershed." U.S. Mem. in Supp. of Mot. for Leave to Intervene as Pl. at 10, *Texas* v. *New Mexico*, *supra* (No. 65, Orig.); see Compl. ¶¶ XVII and XVIII, *Texas* v. *New Mexico*, *supra* (No. 65, Orig.) (referring to rights under federal reclamation projects). The United States noted that "[t]he Pecos River Compact does not purport to affect the water rights of the United States," but "[t]his does not mean * * * that the rights and obligations of the United States will be unaffected by the outcome of the litigation." U.S. Mem. in Supp. of Mot. for Leave to Intervene as Pl. at 10, *Texas* v. *New Mexico*, *supra* (No. 65, Orig.). This Court recognized that the United States intervened in the case "to protect its own claims on the waters of the Pecos River, which had been preserved in Art[icles] XI-XII of the Compact." *Texas* v. *New Mexico*, 462 U.S. at 562. Similar to the Rio Grande Compact, Article XI of the Pecos River Compact provides that "[n]othing in this Compact shall be construed as * * * [a]ffecting the obligations of the United States

under the Treaty with the United Mexican States" or "[a]ffecting any rights or powers of the United States * * * in or to the waters of the Pecos River." 63 Stat. 164-165.

The United States also intervened in a prior suit filed by Texas and New Mexico against Colorado involving the Rio Grande Compact. See U.S. Mot. for Leave to Intervene as Pl., Compl. in Intervention, and Mem. for the U.S., *Texas* v. *Colorado*, No. 29, Orig. (filed Apr. 19, 1968); *Texas* v. *Colorado*, 391 U.S. 901 (1968) (No. 29, Orig.) (granting United States' motion for leave to intervene). The United States intervened in that action "to protect its rights in the Rio Grande stream system." U.S. Compl. ¶ VI, *Texas* v. *Colorado*, No. 29, Orig. (filed Apr. 19, 1968). In its complaint, the United States alleged that, "[a]ssuming that the Rio Grande Compact is valid and enforceable, * * * the United States believes that its interests will be protected by compliance with its terms." *Ibid.* The United States reserved the right to amend its complaint "[i]n the event of * * * a determination by the Court that the Compact must be * * * construed or * * * reformed as to jeopardize the interests of the United States." *Ibid.* Accordingly, the Master's understanding that it is unprecedented for the United States to intervene as a party plaintiff to enforce federal interests and obligations that are protected by an interstate compact is incorrect.

b. The Master has recommended that the United States' claim that New Mexico has violated the Compact should be dismissed because of his view that only an entity that has received an apportionment of water under a compact may sue to enforce it. Here, however, although the Compact does not apportion water to the

United States in the manner that compacts and equitable apportionment decrees typically apportion water to States, the Compact does expressly require New Mexico to deliver a specified quantity of water to a project owned and operated by the United States to fulfill federal purposes, including delivery of water to meet irrigation demands in Texas and thereby effectuate the equitable apportionment of Rio Grande water among the States. In any event, the Master is incorrect.

The Master's conclusion that an entity must receive an apportionment of water to state a claim under an interstate compact, Rep. 221-231, is based primarily on *Nebraska* v. *Wyoming*, 325 U.S. 589 (1945), and 515 U.S. 1 (1995). But that case does not support the Master's conclusion or "hold[]" that "in order to state a claim under [a compact]," the United States must assert compact violations that undermine an apportionment of water to the United States itself. Rep. 231.

i. In *Nebraska* v. *Wyoming*, Nebraska brought an original action against Wyoming and Colorado seeking an equitable apportionment of the North Platte River. 325 U.S. at 592-593. The Court granted the United States leave to intervene as a defendant, 304 U.S. 545 (1938) (No. 9, Orig.), and it later rejected the United States' request for its own allocation of water for Reclamation projects on the North Platte River. The Court held that because the United States acquires water rights for Reclamation projects under state law, the United States' water for a project is included within the States' equitable apportionment and does not warrant a separate apportionment of water to the United States. 325 U.S. at 614-616, 629. In 1945, the

Court entered an equitable apportionment decree dividing the water of the North Platte River among the States. *Id.* at 665.

ii. In 1986, Nebraska returned to the Court to enforce the decree. *Nebraska* v. *Wyoming*, 507 U.S. 584, 587 (1993). During that phase of the case, Wyoming challenged the priority date of the Inland Lakes—reservoirs in Nebraska that are part of a Reclamation project. *Id.* at 593-594. The Court granted summary judgment to the United States and Nebraska on claims that, although Reclamation lacked a state storage permit for the reservoirs, Reclamation's practice of storing water in the reservoirs was "necessary to ensure the delivery of the 46,000 acre-feet of water [to Nebraska] envisioned in the apportionment." *Id.* at 595. The Court granted "summary judgment * * * that the decree entitles [Reclamation] to continue its longstanding diversion and storage practices" and that the priority date of the Inland Lakes was a "necessary predicate of the apportionment" that was settled in the equitable apportionment decree. *Id.* at 594-595. The 1993 decision in *Nebraska* v. *Wyoming* thus demonstrates that the United States may enforce an equitable apportionment decree (and, by analogy, an interstate compact) to protect Reclamation project characteristics that are a "necessary predicate" to the apportionment of an interstate stream. *Id.* at 595.

iii. In 1995, *Nebraska* v. *Wyoming* returned to the Court for review of the Master's recommendation on the States' motions to amend their pleadings. 515 U.S. at 1, 6. This Court permitted Wyoming to bring a cross-claim "against the United States alone, alleging that federal management of reservoirs has contravened state and federal law as well as contracts gov-

erning water supply to individual users." *Id.* at 15. The Court agreed with the Master that the cross-claim could go forward because the equitable apportionment decree "was framed based in part on assumptions about storage water rights and deliveries," and Wyoming had alleged that the United States' operation of its projects "ha[d] the effect of undermining Wyoming's apportionment." *Id.* at 16 (citation omitted).

In this case, the Master concluded that *Nebraska* v. *Wyoming* "hold[s]" that an entity may assert claims to enforce an interstate compact only if that entity has its own apportionment of water that is undermined by a compact violation. Rep. 231. But that is not what the Court held. The Court concluded that because Wyoming alleged that the United States' operation of federal projects "undermine[d] the operation of the decree," the State had "state[d] a claim arising under the decree itself" and could proceed with a claim directly against the United States, which had intervened in the original action but had received no apportionment of water under the decree. *Nebraska* v. *Wyoming*, 515 U.S. at 20. If a State can bring claims against the United States under an interstate compact to which the United States is not a party for operating its projects in a way that undermines an equitable apportionment decree, then the United States should be permitted to state a claim arising under the Compact where a State undermines the operation of the Compact's equitable apportionment scheme to the detriment of a project owned and operated by the United States that was a "necessary predicate" for the Compact, 507 U.S. at 595, and that the Compact expressly protects.

B. The United States May Enforce The Compact As A Third-Party Beneficiary

Alternatively, viewing the Compact as a contract among Colorado, New Mexico, and Texas and analyzing the United States' complaint in intervention under contract principles, the United States may bring a claim for declaratory and injunctive relief against New Mexico as an intended third-party beneficiary of the Compact. In addition to being analyzed as federal statutes, "[i]nterstate compacts are construed as contracts under the principles of contract law." *Tarrant Reg'l Water Dist.*, 133 S. Ct. at 2130 (citing *Texas* v. *New Mexico*, 482 U.S. 124, 128 (1987)). Under contract-law principles, "[a] promise in a contract creates a duty in the promisor to any intended beneficiary to perform the promise, and the intended beneficiary may enforce th[at] duty." Restatement (Second) of Contracts § 304 (1981).

To establish that it is an intended third-party beneficiary with rights to enforce a contract, "the third party must show that the contract reflects the express or implied intention of the parties to the contract to benefit the third party." *Smith* v. *Central Ariz. Water Conservation Dist.*, 418 F.3d 1028, 1035 (9th Cir. 2005) (quoting *Klamath Water Users Protective Ass'n* v. *Patterson*, 204 F.3d 1206, 1211 (9th Cir. 1999), cert. denied, 531 U.S. 812 (2000)). Furthermore, the third party must show that the contract "reflects an intention to benefit the party directly." *Klamath Irrigation Dist.* v. *United States*, 67 Fed. Cl. 504, 533 (2005) (quoting *Glass* v. *United States*, 258 F.3d 1349, 1354, opinion modified on reh'g, 273 F.3d 1072 (Fed. Cir. 2001); see *German Alliance Ins. Co.* v. *Home Water Supply Co.*, 226 U.S. 220, 230 (1912). "It is well-

settled that the United States may be a third party beneficiary to an agreement between two other parties." *West Chelsea Bldgs.* v. *United States*, 109 Fed. Cl. 5, 16 (2013) (holding that United States was a third-party beneficiary to a covenant-not-to-sue agreement) (citing *United States* v. *State Farm Mut. Auto. Ins. Co.*, 936 F.2d 206, 207 (5th Cir. 1991) (holding that United States was a third-party beneficiary to an insurance policy)).

For the same reasons that the United States may enjoin violations of the Compact considered as a federal law that protects federal interests, the United States is an intended third-party beneficiary with enforceable rights under the Compact. Congress required a federal representative to participate in compact negotiations specifically to ensure that the Compact would protect the United States' obligation to deliver water to Mexico and its investment in and operation of the Rio Grande Project. See 1929 Act ch. 520, 45 Stat. 1502; Rep. 120. The Master recognized that Article XVI of the Compact, which protects the United States' treaty obligations to Mexico, "was incorporated to meet the requir[e]ments * * * of the United States." Rep. 170.

The resulting Compact "wholly incorporate[s]" a federal reclamation project and reflects the States' intent that the Project "be the sole vehicle by which Texas and lower New Mexico would receive their equitable apportionments of the Rio Grande waters." Rep. 195; see Rep. 204, 209. The Compact "protects the water that is released from Elephant Butte in order for it to reach its intended destination" as irrigation water for Reclamation contract-holders and for Mexico, Rep. 200, and it expressly protects the United

States' obligation to deliver water to Mexico pursuant to the 1906 Treaty, Art. XVI, 53 Stat. 792. Because Reclamation is responsible for releasing water from the Project pursuant to the United States' contract and treaty obligations, those provisions reflect the States' intentions to benefit the United States directly by protecting its ability to carry out those obligations. The United States can thus enforce the Compact as an intended third-party beneficiary.

CONCLUSION

The Court should reject the Special Master's recommendation that the United States' complaint in intervention should be dismissed "to the extent that the United States cannot state a plausible claim under the 1938 Compact." Rep. 237.

Respectfully submitted.

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JUNE 2017